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6 UNITED STATES DISTRICT COURT
7 EASTERN DISTRICT OF WASHINGTON
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9 UNITED STATES OF AMERICA,

10 Plaintiff,

11 v.

12 PAUL E. HINES,

13 Defendant.
14

No. 2:03-cr-02023-SAB

ORDER GRANTING

**28 U.S.C. § 2255 PETITION TO
VACATE SENTENCE AND FOR
IMMEDIATE RELEASE**

15 On December 9, 2015, the Court held a hearing on Petitioner's
16 28 U.S.C. § 2255 Petition to Vacate Sentence and for Immediate Release. ECF No.
17 138. The Government was represented by Ian Garriques, the defendant was
18 represented by Meredith B. Esser and Alison K. Guernsey. Petitioner was not
19 present. *See* Fed. R. Crim. P. 43.

20 In 2003, Petitioner was convicted on one count of Felon in Possession of
21 Firearm, 18 U.S.C. § 922(g)(1), and one count of False Statement in Acquisition
22 of Firearm, § 922(a)(6). Each of those crimes normally carries a statutory
23 maximum sentence of ten years imprisonment. Petitioner had previous convictions
24 for Second Degree Burglary in Washington which were determined to be
25 qualifying offenses under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. §
26 924(e)(2)(B). Under the ACCA sentencing enhancement, Petitioner was sentenced
27 to the mandatory minimum of fifteen years imprisonment.
28

**ORDER GRANTING 28 U.S.C. § 2255 PETITION TO
VACATE SENTENCE AND FOR IMMEDIATE RELEASE # 1**

1 Petitioner brings this successive petition for habeas corpus alleging that—in
2 light of *Johnson v. United States*, 135 S. Ct. 2251 (2015)—he is actually innocent
3 of the ACCA enhancement and has served a sentence in excess of the ten-year
4 maximum sentence that would have been applicable absent the enhancement. For
5 purposes of this Petition, the Government concedes the Petition is properly before
6 the court procedurally.

7 *Analysis*

8 Under 28 U.S.C. § 2255, a prisoner in custody pursuant to a judgment and
9 sentence imposed by a federal court, who claims the right to be released because
10 his sentence was imposed in violation of the Constitution or laws of the United
11 States, or that the sentence was in excess of the maximum authorized by law, may
12 move the court that imposed the sentence to vacate, set aside, or correct the
13 sentence.

14 To determine whether the ACCA enhancement applies to Petitioner in light
15 of the Supreme Court’s recent decision in *Johnson*—which held a portion of the
16 ACCA was unconstitutional—the Court must determine if Petitioner’s previous
17 convictions for Second Degree Burglary constitute “violent felon[ies].” The Court
18 begins with the “categorical approach” where it must compare the elements of the
19 Second Degree Burglary statute to the “generic crime” of burglary. *Descamps v.*
20 *United States*, 133 S. Ct. 2276, 2281 (2013). The prior conviction qualifies as an
21 ACCA predicate only if the statute’s elements are the same as, or narrower than,
22 the elements of the generic offense. *Id.* In other words, if any conduct that could
23 be prohibited by the state statute would always also be prohibited by the generic
24 offense, then the state statute is a categorical match. If conduct could be illegal
25 under the state statute but not covered by the generic offense, there is no
26 categorical match.

27 If the prior convictions are not a categorical match, the Court must
28 determine if the state statute is divisible or indivisible. If the statute is divisible,

1 the Court applies the “modified categorical approach.” *Id.* at 2281-82. The
2 modified categorical approach allows the sentencing court to consult a limited set
3 of documents—such as jury instructions and indictments—to determine which
4 portion of the divisible statute the defendant was actually convicted under. *Id.*

5 Here, the Washington state second degree burglary statute is at issue. The
6 former RCW 9A.52.030(1), stated: “[a] person is guilty of burglary in the second
7 degree if, with intent to commit a crime against a person or property therein, he
8 enters or remains unlawfully in a building other than a vehicle.” *State v. Deitchler*,
9 75 Wash. App. 134, 136 (*quoting* former RCW 9A.52.030(1)). The relevant
10 definitions statute provides:

11 “Building,” in addition to its ordinary meaning, includes any
12 dwelling, fenced area, vehicle, railway car, cargo container, or any
13 other structure used for lodging of persons or for carrying of
14 business therein, or for the use, sale, or deposit of goods; each unit
of a building consisting of two or more units separately secured or
occupied is a separate building.”

15 RCW 9A.04.110. Generic burglary, or the federal definition of burglary,
16 includes “unlawful or unprivileged entry into, or remaining in, a building
17 or structure, with intent to commit a crime. *Descamps*, 133 S. Ct. at 2283.

18 Both the Petitioner and the United States concur that Washington’s
19 second degree burglary statute, as it was when Petitioner was convicted, is
20 not a categorical match with generic burglary—the Court agrees. The state
21 burglary statute is not a categorical match because it encompasses physical
22 areas that are not covered under generic burglary. For instance, the state
23 statute covers “fenced area[s] . . . railway car[s], [and] cargo containers,”
24 whereas the generic definition does not include those types of spaces.
25 *United States v. Wenner*, 351 F.3d 969, 972-73 (9th Cir. 2003); *see also*
26 *Taylor v. United States*, 495 U.S. 575, 990-95 (1990).

27 Next, the Court must determine if the Washington statute is divisible,
28 and, if so, apply the modified categorical approach to determine whether

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1 Petitioner’s prior convictions constitute predicates for the ACCA
2 enhancement. *See Descamps*, 2276 S. Ct. at 2281-82. A statute is divisible
3 when it contains alternative elements. *Id.* at 2285. The Court of Appeals for
4 the Ninth Circuit recently expounded upon the test to determine whether a
5 statute is divisible in *Rendon v. Holder*. 764 F.3d 1077 (2014). In *Rendon*,
6 the Court of Appeals explained “while indivisible statutes may contain
7 multiple, alternative means of committing the crime, only divisible statutes
8 contain multiple alternative elements of functionally separate crimes.” *Id.*
9 at 1085. A statute that refers to multiple alternative means of commission is
10 still indivisible if the jurors need not agree on which method of committing
11 the offense the defendant performed. *Id.* In other words, if a statute
12 prohibited “taking or keeping” an item, the statute would be divisible if all
13 jurors had to agree on the issue of whether the defendant took the item or
14 whether he kept the item. By contrast, the same statute would be indivisible
15 if a jury could convict a defendant so long as each juror agreed the
16 defendant did one or the other—that is, if nine jurors believed the
17 defendant took the item, while the remaining three jurors believed the
18 defendant kept the item. The Court of Appeals recently reiterated this
19 distinction in *United States v. Dixon*. 805 F.3d 1193 (Nov. 20, 2015).

20 Here—as noted above—the portion of the state statute that exceeds
21 the generic definition of burglary is what constitutes a building. Thus, the
22 Court must analyze whether the alternative state definitions of building are
23 means of committing the crime or alternative elements of a crime. At first
24 blush, the statute appears to be indivisible, containing alternative means of
25 committing the crime, because the overbroad portions of state law is
26 contained in a separate definitional statute rather than contained within the
27 burglary statute itself. *See* RCW 9A.04.110; former RCW 9A.52.030(1).
28 Indeed, in Washington, “[d]efinition statutes do not create additional

1 alternative means of committing an offense.” *State v. Linehan*, 147
2 Wash.2d. 638, 646 (2002) (internal citations omitted). Similarly, the
3 Washington Pattern Jury Instructions do not require a jury to agree on what
4 type of building was entered or unlawfully remained in. 11A Wash. Prac.,
5 Pattern Jury Instr. Crim. WPIC 60.04 (3d Ed). Therefore, the Washington
6 statute contains alternative means rather than alternative elements.

7 The United States cites *United States v. Brooks* to argue the
8 Washington statute is divisible. 532 F. App’x 670, 671 (9th Cir. June 25,
9 2013). This argument is unconvincing for three reasons. First, although
10 *Brooks* was decided after *Descamps*, it did not properly apply *Descamps*.
11 *Brooks* was decided just five days after the Supreme Court’s *Descamps*
12 decision. Though the Court of Appeals cited *Descamps* and applied the
13 modified categorical approach, the Court neglected to analyze the
14 divisibility of the statute at all. Second, *Brooks* was decided before the
15 Court of Appeals clearly elucidated the divisibility test in *Rendon* and
16 *Dixon*. Because the test had not been so clearly announced at the time of
17 the *Brooks* decision, it is unclear if the Court of Appeals would still apply
18 the modified categorical approach to the statute today. Last, *Brooks* was an
19 unpublished decision. Under Ninth Circuit Rule 36-3, the case is not
20 precedent and should not be cited to any court in the circuit with few
21 exceptions not applicable here.

22 Applying *Rendon* and *Dixon*, it is clear the Washington Second
23 Degree Burglary statute, former RCW 9A.52.030(1), is indivisible and the
24 modified categorical approach cannot be applied. Because the state statute
25 is not a categorical match to the generic crime of burglary and because the
26 statute is indivisible, the state crime cannot be considered a predicate
27 “violent felony” under the enumerated clause of the ACCA. Post-*Johnson*,
28 the Washington burglary statute cannot be an ACCA-predicate under the

1 so-called residual clause of the ACCA either. *See Johnson*, 135 S. Ct. at
2 2257 (holding the residual clause violates the Due Process Clause).
3 Accordingly, Petitioner is actually innocent of the ACCA enhancement
4 under which he was sentenced. He is therefore entitled to be resentenced on
5 his underlying convictions for Felon in Possession of a Firearm and False
6 Statement in Acquisition of Firearm absent the ACCA enhancement.
7 Petitioner's 18 U.S.C. § 2255 Petition to Vacate Sentence and for
8 Immediate Release, ECF No. 138, is **GRANTED**.

9 Accordingly, **IT IS HEREBY ORDERED:**

10 1. Petitioner's 18 U.S.C. § 2255 Petition to Vacate Sentence and for
11 Immediate Release, ECF No. 138, is **GRANTED**.

12 2. Petitioner's sentence imposed pursuant to the Armed Career Criminal
13 Act, ECF No. 74, is **VACATED**.

14 3. Petitioner Paul Hines **shall be released without delay** from the Bureau
15 of Prisons and shall not serve the remainder of the sentence imposed.

16 4. Petitioner will be resentenced on the underlying convictions on **March**
17 **23, 2016** at 11:00 a.m. in **Yakima**, Washington. Petitioner must be
18 present at that hearing.

19 5. The United States Probation Office **shall prepare** a timely amended
20 presentence investigation report which will reflect Petitioner's actual
21 innocence under the ACCA, and comply with the following schedule:

22 (a) Not less than **35 days prior to the date set for sentencing**, the
23 Probation Officer shall disclose the presentence investigation report to counsel
24 for Defendant and the Government. **Within 14 days thereafter**, counsel shall
25 communicate in writing to the probation office any objections they may have as
26 to any factual errors or omissions; sentencing classifications; sentencing
27 guideline ranges; and policy statements contained in or omitted from the report.
28

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1 Such communication may be oral initially, but shall immediately be confirmed in
2 writing to the Probation Officer and opposing counsel.

3 Objections shall be numbered and identify the paragraph(s) to which the
4 objection applies. Objections shall address the PSR in sequential order, beginning
5 with the lowest numbered paragraph.

6 (b) After receiving counsel's objections, the Probation Officer shall
7 conduct any further investigation and make any revisions to the presentence report
8 that may be necessary. The Probation Officer may require counsel for both parties
9 to meet with the officer to discuss unresolved factual and legal issues and counsel
10 shall make themselves available for that purpose.

11 (c) At least **10 days prior to the date of the sentencing hearing**, the
12 Probation Officer shall submit the presentence report to the sentencing judge. The
13 report shall be accompanied by an addendum setting forth any objections counsel
14 may have made, including those that have not been resolved, together with the
15 officer's comments and recommendations thereon. The Probation Officer shall
16 certify that the contents of the report, other than sentencing recommendations,
17 including any revisions or addenda, have been disclosed to counsel for the
18 Defendant and the Government, and that the addendum fairly states any remaining
19 objections.

20 (d) Except with regard to any written objection made under sub division
21 (a), the report of the presentence investigation and computations shall be accepted
22 by the Court as accurate. Upon a timely objection by the Defendant, the
23 Government bears the burden of proof on any fact that is necessary to establish the
24 base offense level. The Court, however, for good cause shown, may allow a new
25 objection to be raised at any time before the imposition of sentence. In resolving
26 disputed issues of fact, the Court may consider any reliable information presented
27 by the Probation Officer, the Defendant, or the Government.

(e) Nothing in this Order requires the disclosure of any portions of the PSR that are not disclosable under Rule 32 of the Federal Rules of Criminal Procedure.

(f) The presentence report shall be deemed to have been disclosed: (1) when a copy of the report is physically delivered; or (2) one day after the report's availability for inspection is orally communicated; or (3) three days after a copy of the report or notice of its availability is mailed to counsel, whichever date is earlier.

(g) **Any memorandum or motion** regarding sentencing must be filed and served at least **15 days prior to the date set for sentencing**. The opposing party shall file and serve a response, if any, **within 7 days** of receipt of the motion.

(h) If it is determined that the Defendant may qualify for the safety valve (5C1.2), the parties must schedule a meeting to conduct a safety valve interview to determine if the Defendant has met the requirements of U.S.S.G. § 5C1.2(a)(5) **no later than 10 days prior to the sentencing hearing**. Counsel may request a continuance of the sentencing hearing if the ends of justice so require.

6. The United States Probation Office **shall assign** a Pretrial Services Officer to supervise Petitioner pending resentencing. The Office **shall inform** defense counsel of the officer assigned immediately.

7. Petitioner will be subject to the following pre-sentencing conditions of release:

1. Petitioner shall not commit any offense in violation of federal, state or local law.
2. Given his current residence in Tucson and the time needed to travel to the Eastern District of Washington, within five business days of release, Petitioner shall advise defense counsel of his release address, which defense counsel will immediately communicate to the assigned probation officer.

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3. Within 24 hours of receiving the identity of his probation officer, Petitioner shall contact said officer telephonically or in person and shall report as often as they direct, at such times and in such manner as they direct.
4. Petitioner shall appear at all proceedings as required.
5. Defendant shall not possess a firearm, destructive device or other dangerous weapon.
6. Defendant shall refrain from the use or unlawful possession of a narcotic drug or other controlled substances defined in 21 U.S.C. § 802, unless prescribed by a licensed medical practitioner. Defendant may not possess or use marijuana, regardless of whether Defendant has been prescribed a medical marijuana card.

IT IS SO ORDERED. The District Court Executive is hereby directed to file this Order, provide copies to counsel, Probation, and the U.S. Marshal Service who **shall immediately** serve a copy to the Bureau of Prisons.

DATED this 11th day of December 2015.



A handwritten signature in blue ink, reading "Stanley A. Bastian", is written over a horizontal line.

Stanley A. Bastian
United States District Judge